**[Cite as *State v. Powell*, 2019-Ohio-3507.]**

# COURT OF APPEALS OF OHIO

## EIGHTH APPELLATE DISTRICT
## COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, :

No. 107006

v. :

ANTONIO POWELL, :

Defendant-Appellant. :

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JOURNAL ENTRY AND OPINION

**JUDGMENT:** APPLICATION DENIED
**RELEASED AND JOURNALIZED:** August 27, 2019

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Cuyahoga County Court of Common Pleas
Case No. CR-17-615121-B
Application for Reopening
Motion No. 528061

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***Appearances:***

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Frank Romeo Zeleznikar, Assistant Prosecuting Attorney, *for appellee.*

Antonio Powell, *pro se*.

MICHELLE J. SHEEHAN, J.:

**{¶ 1}** Antonio Powell has filed a timely application to reopen his direct appeal pursuant to App.R. 26(B). Powell seeks to reopen the appellate judgment,

rendered in *State v. Powell*, 8th Dist. Cuyahoga No. 107006, 2019-Ohio-346, alleging ineffective assistance of appellate counsel. Specifically, Powell alleges his appellate counsel failed to appeal (1) the improper sentence of a 5-year-firearm specification for Count 5, and (2) the failure to merge attempted murder charges. For the reasons stated below, we decline to reopen Powell=s original appeal.

**Standard of Review Applied to an App.R. 26(B) Application for Reopening**

**{¶ 2}** In order to establish a claim of ineffective assistance of appellate counsel, Powell is required to establish that the performance of his appellate counsel was deficient and the deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 767 (1990).

**{¶ 3}** In *Strickland*, the United States Supreme Court held that a court's scrutiny of an attorney's work must be highly deferential. The court further stated that it is all too tempting for a defendant to second-guess his attorney after conviction and that it would be too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Thus, a court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*.

## First Proposed Assignment of Error

{¶ 4} Powell alleges the following proposed assignment of error:

> Appellant's Fifth and Fourteenth Amendment Rights against Double Jeopardy were violated when he was sentenced to five years on a firearm specification that was deleted on count five.

{¶ 5} Powell argues that appellate counsel was ineffective by failing to argue on appeal a void sentence. Specifically, Powell argues that the trial court erred by imposing a five-year term of incarceration on a firearm specification associated with Count 5 because the firearm specification had been allegedly deleted by the state.

{¶ 6} Contrary to Powell's claim, the record demonstrates that the five-year firearm specification was not deleted by the state and Powell entered a voluntary and knowing plea of guilty to Count 5 with the appurtenant five-year firearm specification. *See* tr. 1-7 and tr. 14-27. In fact, the trial court's February 6, 2018 journal entry specifically states that Powell agreed to plead guilty to Count 5, attempted murder, as well as the attendant five-year firearm specifications and forfeiture specifications. The journal entry provides in relevant part:

> On recommendation of prosecutor, Count(s) 5, 8, 11, 14, 17, 20, 23, 26, 29, 32, 35 of indictment is/are amended by deletion of firearm specification(s) — 1 year (2941.141), firearm specification(s) — 3 years (2941.145), firearm specifications — 7 years (2941.1412).
>
> * * *
>
> Defendant retracts former plea of not guilty and enters a plea of guilty to attempted murder 2923.02/2903.02 a F1 with firearm specification(s) 5 years (2941.146), forfeiture specification(s) (2941.1417) as amended in Count(s) 5, 8, 11, 14, 17, 20, 23, 26, 29, 32, 35 of the indictment.

Per the journal entry, the court deleted the 1-, 3-, and 7-year firearm specifications relating to Counts 5, 8, 11, 14, 17, 20, 23, 26, 29, 32, and 35. The 5-year firearm specification was not deleted.

**{¶ 7}** In addition, this court addressed the issue of the five-year firearm specification and held that:

> Indeed, Powell sought the court's clarification on several occasions, and after further discussion with the court, Powell indicated that he understood. For example, when the court noted that the state elected the defendant to be sentenced on the seven-year firearm specification on Count 1, Powell asked:
>
> "That means I'm pleading guilty to a seven-year gun specification on the felony of the first degree attempted murder?" When the court answered "yes," Powell replied, "Yes, Ma'am." When the court advised the defendant that the remaining 11 charges contained five-year firearm specifications, Powell asked the court, "Could you elaborate, please?" Powell then sought clarification of the mandatory consecutive sentence of the firearm specification, and after the court explained it, Powell indicated that he understood. Powell also asked for the court to explain why his offenses are not allied. After the court and the prosecutor offered further explanation, Powell stated that he understood. * * *.
>
> Finally, when the court asked Powell if he agreed to the sentencing range of 15 to 25 years, he replied in the affirmative. *And when the court advised the defendant that the 7-year and 5-year firearm specifications would run consecutively, Powell stated that he understood.* The court then found that Powell knowingly and voluntarily entered his plea "with a full understanding of his constitutional and trial rights," and counsel noted that the court satisfied the Crim.R. 11 requirements. A trial court's adherence to Crim.R. 11, raises a presumption that a plea is voluntarily entered. *State v. Elliott*, 8th Dist. Cuyahoga No. 103472, 2016-Ohio-2637, ¶ 25; *State v. Spence*, 8th Dist. Cuyahoga No. 54880, 1989 Ohio App. LEXIS 167, 3 (Jan. 19, 1989).

(Emphasis added.) *Powell*, 8th Dist. Cuyahoga No. 107006, 2019-Ohio-346, at ¶ 12.

**{¶ 8}** Thus, Powell, through his first proposed assignment of error, has failed to establish that he was incorrectly sentenced to the 5-year-firearm specification nor prejudiced and has not established ineffective assistance of appellate counsel.

**Second Proposed Assignment of Error**

**{¶ 9}** Powell asserts the following second proposed assignment of error:

> The trial court erred when it failed to merge the attempted murder charges as they are allied offenses of similar import in violation of the 5th Amendment; Double Jeopardy Clause to the United States Constitution and the Ohio Constitution, Article I, Section 10.

Powell argues that the 24 counts for attempted murder should have merged as allied offenses of similar import.

**{¶ 10}** R.C. 2941.25, which deals with allied offenses of similar import, provides that:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

**{¶ 11}** The test to be applied, in order to determine whether offenses are allied, was established in *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892. The Supreme Court of Ohio held in *Ruff* that a defendant can be

convicted for multiple counts when a defendant victimizes more than one victim. The court held:

> At its heart, the allied-offense analysis is dependent upon the facts of a case because R.C. 2941.25 focuses on the defendant's conduct. The evidence at trial or during a plea or sentencing hearing will reveal whether the offenses have similar import. *When a defendant's conduct victimizes more than one person, the harm for each person is separate and distinct, and therefore, the defendant can be convicted of multiple counts.* Also, a defendant's conduct that constitutes two or more offenses against a single victim can support multiple convictions if the harm that results from each offense is separate and identifiable from the harm of the other offense. We therefore hold that two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.

(Emphasis added.) *Ruff* at ¶ 26.

**{¶ 12}** Herein, Powell committed the same offenses, attempted murder, against different victims during the course of his conduct. Specifically, he had "a standoff with the Cleveland police SWAT unit that escalated to a shootout between Powell (and a codefendant) and the police." *Powell*, 8th Dist. Cuyahoga No. 107006, 2019-Ohio-346, at ¶ 2. Thus, a separate animus existed for each victim and the multiple offenses of attempted murder were not allied offenses of similar import. *State v. Black*, 8th Dist. Cuyahoga No. 102586, 2016-Ohio-383; *State v. Crawley*, 8th Dist. Cuyahoga No. 99636, 2014-Ohio-921; *State v. Phillips*, 8th Dist. Cuyahoga No. 98487, 2013-Ohio-1443. Powell, through his second proposed assignment of error, has failed to establish that the multiple offenses merge nor that he was

prejudiced and therefore has not established ineffective assistance of appellate counsel.

**{¶ 13}** Application for reopening is denied.

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MICHELLE J. SHEEHAN, JUDGE

ANITA LASTER MAYS, P.J., and
EILEEN A. GALLAGHER, J., CONCUR